1980

In the matter of the adoption of Peter Kelly McKinstray and Melody Dawn McKinstray : Brief of Respondents

Utah Supreme Court

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Melvin G. Larew, Jr.; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

In the matter of the Adoption of	)	
PETER KELLY McKINSTRAY and MELODY DAWN McKINSTRAY,	)	Case No. 17035
Minors.	)	

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Third Judicial District
In and for Salt Lake County,
State of Utah

Honorable David B. Dee, District Judge

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IN THE SUPREME COURT

STATE OF UTAH

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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a Decree of Abandonment and order denying the Appellant's Motion to Amend Findings and Judgment or in the Alternative for a New Trial.

DISPOSITION OF CASE BY LOWER COURT

Judgment was entered on February 22, 1980, in favor of Respondents on the abandonment issue joined in the pleadings. Appellant moved to amend the findings, conclusions and decree or, alternatively, to open the judgment for the taking of additional testimony, or for a new trial. The motion was based upon the following grounds: (1) the absence of findings regarding the credibility of Appellant and his witnesses; (2) Appellant's inability to present certain testimonial evidence at trial; and (3) the insufficiency of the evidence to justify the decision. Oral argument on the motion was heard by the trial court, and its order denying the same was entered, on April 16, 1980.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court substitute its discretion and view of the testimonial record for that of the trial court, or in the alternative, to remand the case for further evidentiary proceedings to permit Appellant to more fully develop and present his case.

STATEMENT OF FACTS

Appellant's statement of facts consists principally of allegations and conclusions unsupported by the record, and fails the requirement of the appellate rules of this Court, i.e., that the substantial facts supporting the ruling of the trial court must be fully and fairly set forth. Accordingly, Respondents find it necessary to make an accurate and complete statement of material facts.

The Trial

Following her divorce from Appellant in January 1970, (R. 7 and Ex. P-1), Respondent Nadine McKinstray Suesserman and her two children, Melody and Peter, resided with her parents, the McGuires, in Jackson, Wyoming (R. 61). The McKinstray and McGuire families had been residents of the small town of Jackson for many years, 37 and 20 years respectively (R. 64, 177). The two families' homes were only one-half mile apart in the same residential section of town (R. 70); Nadine and Appellant had attended high school together (R. 69); and, the families were well known to each other (R. 72). Except for the brief period between late December, 1972, and February, 1973, while they accompanied their mother on a trip to Ontario, California, the children resided continuously at the McGuire home until September, 1973, at which time Nadine moved with them to Denver, Colorado (R. 62, 73).

Prior to his last contact with the children near Easter

1973, Appellant had always arranged visitations by telephoning the McGuire home (R. 63). Communicating with his ex-wife was difficult, but he was on speaking terms with her mother (R. 213) and was never denied the right to visit with the children (R. 330). Appellant remarried in October 1971; his second wife recalled his experiencing no difficulty having visitation (R. 162). The McKinstray grandparents also visited with Melody and Peter, usually on their birthdays (R. 92).

After 1970, Appellant's child support payments were made with increasing irregularity, and by late September 1972, he was almost eleven months in arrears (Ex. R-2). The arrearage situation precipitated visitation problems which strained relations between the two families to the point that Mrs. McGuire and Mrs. McKinstray argued in November 1972 (R. 186, 187). Mrs. McKinstray, having "made up her mind", never visited with the children again (R. 188). She did, however, engage her son's divorce counsel in early 1973 to obtain Nadine's Ontario, California, address via the Teton County court clerk's office for the ostensible purpose of forwarding the children's late Christmas presents and a February birthday gift for Melody (R. 181; Ex. R-4, R-5 and R-12). Counsel's letter to Nadine addressed to her parents' post office box number (Ex. R-5), an address she had used ever since the divorce and continued to use as a forwarding address until her parents moved from Jackson in 1978 (R. 91), reached her in due course and she supplied her California address without hesitance (R. 82). The presents were not mailed, however, and although

Nadine, Melody and Peter moved back to the McGuires' home in Jackson shortly thereafter -- which Mrs. McKinstray knew (R. 189) -- the presents were never delivered (R. 179; Ex. R-15, R-16, R-17 and R-18).

After Nadine moved back to Jackson from California, she could not agree on visitation terms with Appellant, so he determined to visit the children at their elementary school (R. 214-216). That school visit, near Easter 1973, was the last contact or communication Appellant ever had with his children (R. 75, 91 and 216). Likewise, he made no child support payments after April 23, 1973 (Ex. R-2). Sometime after that Easter 1973, visit Appellant stated to his wife regarding what he felt ". . . for not having his kids" that ". . . he didn't want any more kids. He didn't want to go through this pain any more. He just didn't want no part of it". (R. 171). Appellant made no further requests to visit with the children during the summer of 1973, and Nadine moved with them to Denver, Colorado in September of that year (R. 68). Ten months later, Nadine and the children moved to St. Louis, Missouri, and then to Salt Lake City, Utah, in the fall of 1979 (R. 73).

In each of the years 1974 through 1977, Melody and Peter returned to Jackson to vacation at the McGuire home for the school summer recess period of June, July and August (R. 73, 74 and 94). During the same summer months of 1978, the children were again with the McGuires in their Jackson home and accompanying their grandparents on trips to and from Ennis, Montana, in

the course of their moving to that state (R. 74, 75 and 100).

Some time prior to his last Easter 1973, visit with Melody and Peter, Appellant had moved to Worland, Wyoming, which is 200 to 250 miles northeast of Jackson, where he has resided since (R. 131-134).

Appellant knew that his children were, or had been, in Jackson on numerous occasions over the five-year period following his final Easter 1973, visit with them (R. 216). His brother, Darrell McKinstray, a barber in that town, had seen the children "three or four times" during the summers from 1973 to 1978 (R. 153), most recently in 1978 walking in front of his shop and at the drugstore (R. 152). Darrell also had heard from others including his wife, Candy, that the children were spending summers in Jackson (R. 153); Candy McKinstray had been told by one of Nadine's friends that the children were in Jackson (R. 157). Darrell reported this information to his mother (R. 153). Mrs. McKinstray had received word from other Jackson residents as well --by her own estimate, as many as ten times over the years in question--that her grandchildren had been in town (R. 189, 200, 203), and in the course of her usual monthly telephone conversations with Appellant, she relayed that information to her son (R. 191, 201 and 202). Not once during the entire period did Appellant ask his mother, or his brother, to inquire about the children for him, and his only response to the reports from her was "Oh", or "Did you see them?" (R. 159, 202 and 208).

Darrell McKinstray had occasion to see his brother

in Jackson a couple of times a year but didn't mention the children as he knew Appellant didn't like to talk about them (R. 157 and 158). Even during his customary telephone calls to his mother, Appellant did not discuss the children with any regularity (R. 202). Appellant testified that while on trips to Jackson, other people asked him if he had seen his children, "that they had seen them in Jackson" (R. 216), and that a friend, one Robbins, told him he had seen his children at a Shriners' Circus in town (R. 227-228).

Melody and Peter each testified that they had seen, and been recognized by, their McKinstray grandparents and their uncles Darrell McKinstray and Paul McKinstray many times during their school vacation visits to Jackson over the summers between 1973 and 1978, but that the McKinstrays never spoke to them, never called to see them or to talk to them at the McGuire home, and sent no letters, cards, or birthday presents. Mrs. McGuire's testimony confirmed that of the children's in this regard (R. 98, 99, 100-101, 107, 111-116, 123-125 and 127-128). Nadine also was in the company of the children on some of the summer occasions when they were seen by Mrs. McKinstray and her son, Darrell (R. 90).

Appellant testified that his only efforts to locate his children after the last 1973 visit with them had been to "check phone books" in various cities while truck driving (R. 216-217) and a single inquiry to a Jackson acquaintance, one Olga Nelson. She had no information to give and reacted with "shock" and "surprise" that he would ask her instead of the McGuires (R. 218 and 229). After 1973, and through the summer of 1978, the

McGuires lived in Jackson at the same address Appellant had known as their family residence (R. 228). He knew this and had occasion to drive by that home with his wife numerous times (R. 174 and 228). Until their removal to Montana in 1978, the McGuires' post office box address and telephone number remained the same that Appellant had always used to contact Nadine prior to this last 1973 visit with the children (R. 148). Appellant testified that he was on speaking terms with Mrs. McGuire in 1973 (R. 213); nevertheless, after 1973 he chose not to seek information from the McGuires concerning the whereabouts of Nadine and the children (R. 98 and 227) assuming ". . . she wouldn't tell me where they were . . ." (R. 221). Mrs. McGuire testified that she would have informed the McKinstrays of the childrens' summer visits, but "They never asked" (R. 104). Since April 1973, neither Nadine nor Mrs. McGuire have been contacted by any third person seeking information about the children on Appellant's behalf and no cards, letters or gifts for the children have been received by either of them (R. 75-77, 99 and 101).

Appellant's explanations for failing to expend any other effort than he did to locate and communicate with his children after the Easter 1973, visit were as follows: Three to four years after the divorce, his counsel advised letting "Nadine calm down a little more" (R. 219); if he didn't pay child support he ". . . figured in time she [Nadine] would get fed up with it and she would -- she would start something again" (R. 231); and "As time went by I felt that it was better to wait until -- and

let them [Melody and Peter] contact me" (R. 224). Appellant also rejected further legal proceedings as a means of locating the children because he ". . . had got fed up with the way lawyers was handling things and disgusted with the way the Court system was working" (R. 227).

Appellant admitted that he has had the ability to pay the court-ordered child support throughout the years since 1973 (R. 137, 138). Due to his total lack of contact or communication with his children since that time, he agrees "There's not much left" of any relationship between them (R. 224). Indeed, his children do not know him (R. 90); neither do they have any love or affection for him nor parent-child relationship with him (R. 78)

The Post-Judgment Motion

Appellant submitted no affidavits in support of his motion to open the judgment on the basis of newly-discovered evidence (R. 238), and Respondents made timely objection to that deficiency (R. 239 and 242). Accordingly, Appellant's gratuitous recitation in his Statement of Facts of the proposed testimonial evidence by Shirley Baldwin is without foundation in the record.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S RULE 52 AND 59 MOTION TO TAKE ADDITIONAL EVIDENCE AND AMEND FINDINGS.

A principle basic to our system of jurisprudence is that once a litigant has had his day in court and a judgment has been entered,that judgment is to be final and will not be disturbed unless clear and substantial error is shown. Burton v. Zions Co-op Mercantile Institution, 122 Utah 360, 249 P.2d 514 (1953) With that policy in mind, motions to amend findings and judgments or to obtain new trials, are not looked upon with favor. Newbern v. Exley Produce Express, 303 P.2d 231, 235 (Ore. 1956).

The criteria for granting a motion for further evidentiary proceedings to amend findings upon the basis of newly-discovered evidence has been codified in Rule 59(a)(4) of the Utah Rules of Civil Procedure:

> Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

The trial court is permitted wide discretion in ruling on such motions, and this Court will not disturb those rulings unless it is manifestly clear that the lower court abused its discretion or that a miscarriage of justice has occurred. Uptown Appliance & Radio Co. v. Flint, 249 P.2d 826 (Utah 1952). However, a predicate to the existence of such discretion in the trial court to grant a motion such as the one made by Appellant is the showing of the requisite statutory grounds. Tangaro v. Marrero, 13 Utah 2d 290, 373 P.2d 390 (1962).

The Appellant submitted no affidavits in support of his Rule 52 and 59 motion to take newly-discovered evidence as mandated by Rule 59(c), U.R.C.P. (R. 238), and Respondents made

timely objection to that statutory deficiency (R. 239 and 242). Such affidavits must set out both the proposed testimony and the specific circumstances of the movant's efforts to discover and produce that evidence prior to trial. Sabin v. Rauch, 255 P.2d 206 (Ariz. 1952); Fusselman v. Yellowstone Valley Land & Irrigation Co., 163 P. 473 (Montana 1917). Accordingly, the trial court was invested with no discretion in this matter in the first instance, and Appellant's representations that the trial court did not require the submission of affidavits is not supported by the record.

Assuming arguendo that the trial court had the discretion to consider Appellant's post-judgment motion to hear the "Shirley Baldwin" evidence in the absence of the requisite factual showing, it did not abuse that discretion in denying to open the judgment for the reason that Appellant failed to demonstrate either (1) that he had exercised due diligence or (2) that the evidence was so substantially material that in all likelihood the court's judgment would have been different. Universal Ins. Co. v. Carpets Inc., 16 Utah 2d 336, 400 P.2d 564 (1965).

First, Appellant's witnesses knew of Shirley Baldwin (R. 104, 160 and 127). Appellant failed to particularize his pre-trial efforts to locate that witness, and we have only his conclusory, self-serving statements that diligent attempts were made to locate her and that only after trial was she found by telephoning her residence in Arizona (R. 240). It is held that

where it appears that the degree of activity or inquiry which led to the discovery of a witness or evidence after tial would have produced the same evidence had it been exercised prior thereto, due diligence has not been exercised. In re Hore's Estate, 19 N.W. 2d 893 (Minn. 1945); 58 AmJur 2d, New Trial, §169, pp. 381-382. Apparently, all that was required of Appellant to locate Shirley Baldwin was a more earnest telephone search. That being the case, he did not exercise the requisite pre-trial diligence.

Second, the proffered testimonial evidence does not suggest the reasonable likelihood of a different result at trial. Appellant's counsel candidly admitted at the hearing on his post-judgment motion that the pivotal issue in the case was whether Mr. McKinstray made sufficient efforts over the years in question to locate his children. By his own admissions, he made only token efforts (R. 216-218 and 229), and the court so found. In light of those damaging admissions any conversations Nadine may have had with Shirley Baldwin--even if they evidenced Nadine's desire that Appellant never visit the children--would not have effected the trial court's view of the evidence and ruling that his failure to communicate with the children was without good cause or justification.

Appellant's Rule 52 and 59 motion was properly denied.

POINT II

APPELLANT HAS NOT BEEN DENIED DUE PROCESS OR EQUAL PROTECTION OF LAW.

Appellant concedes that Point II of his argument is ". . . a novel one which . . . may be without merit." Respondents agree that it is without merit.

1. Findings regarding credibility of witnesses are not necessary.

This Court has held that findings of a trial court sitting without jury should be limited to the ultimate facts to be determined, and that they are none the less findings of fact because they are drawn as conclusions from other intermediate facts. Jankele v. Texas Co., 88 Utah 325, 54 P.2d 425 (1936). If the findings follow the allegations of the pleadings, even though they are general and limited to the ultimate facts, they are sufficient to support the judgment. Pearson v. Pearson, 561 P.2d 1080 (Utah 1977).

The trial court's Findings of Fact (R. 35-37) set out the essential facts upon which its decree is based, including Appellant's ability and failure to pay support over a long period, his failure to communicate or maintain a parental relationship with his children as a result of minimal or token effort to do so without good cause or justification and his manifestation of an intent to abandon them. The trial court had to resolve in its own mind many intermediate facts to arrive at these ultimate ones. Even though the court chose not to delineate those many subordinate facts, its announced findings are no less valid or sufficient.

Respondents are aware of no requirement that a trial court's written findings include findings regarding the credibility of witnesses. The process of resolving issues of fact obviously includes an analysis of the weight to be given contradictory evidence, the view to be taken of any given evidence in the light of

other evidence and a consideration of the believability of the witnesses presenting the evidence. "Credibility" is not an issue to be resolved and found as fact; rather, it is an intangible element to be applied by the fact-finder in the process of deciding which facts exist. The trial court's determination of which witnesses were believable and which witnesses were not are implicit in its findings of ultimate facts.

2. This Court's review standards are not inconsistent with trial standards of proof.

The standard of review applied by this Court to rulings on plenary hearings in equity cases is simply stated: unless the evidence is clearly insufficient to sustain the findings, or the findings are demonstrated to be manifestly against the weight of the evidence, they will not be disturbed. Peterson v. Peterson, 190 P.2d 135 (Utah 1948); Shaw v. Jeppson, 239 P.2d 745 (Utah 1952). This appellate standard is applied irrespective of whether the burden of proof at trial was that necessary to persuade the trier of fact by a "preponderance of the evidence" or by "clear and convincing evidence". McMahon v. Tanner, 249 P.2d 502 (Utah 1952); Peterson, supra.

The subtlety of Appellant's suggestion that he has been denied due process and equal protection of the law as a result of this Court's failure to apply a more strict standard of review to cases in which the clear and convincing burden of proof applies escapes Respondents. Irrespective of the burden of proof at trial,

the standard is the same on appeal, i.e., the findings will be upset only if reasonable minds could not differ in deciding to the contrary. Robertson v. Hutchinson, 560 P.2d 1110 (Utah 1977). The "reasonable mind" standard is the constant yardstick applied by this Court in determining whether the findings of the trier of fact are shown by the recorded evidence to be more probable than not ("preponderance") or to be beyond probability and clinched in the mind ("clear and convincing"). Greener v. Greener, 212 P.2d 194, 204 (Utah 1949).

POINT III

APPELLANT HAS NO STANDING TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE.

At no point in the proceedings below did Appellant move the court for a directed verdict pursuant to Rule 50(a), U.R.C.P. Accordingly, he has no standing on appeal to assert the insufficien of the evidence to support the judgment.

> The law is to the effect that one who does not move for a directed verdict generally has no standing to urge on appeal that the evidence does not support the judgment. However, an exception exists where plain error appears in the record and it would result in a miscarriage of justice to affirm the judgment.
>
> Henderson v. Meyer, 533 P.2d 290, 291-92 (Utah 197

Appellant has not particularized for this Court any "plai error" in the record which demonstrates a miscarriage of justice. It is mandatory that a litigant argue that his opponent has not

established his case as a matter of law via the appropriate motion to the trial court. This Appellant did not do.

POINT IV

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S JUDGMENT UNDER THE LAW OF THE CASE.

There is no dispute in this case that Appellant failed to pay child support for six and one-half years notwithstanding his ability to do so (R. 137 and 138). Neither is it disputed that he failed over the same period of time to maintain a parental relationship with them. The crucial issues presented are: Whether Appellant's lack of communication with his children and his failure to expend more effort than he did to locate them was without good cause and whether his conduct evidenced an intention to abandon them. The trial court found against Appellant on each of these issues (R. 36), and those findings are amply supported by the evidence.

The facts regarding Appellant's efforts after Easter 1973 to locate his children were not in dispute. He described those as being telephone book searches in various cities to which he traveled as a long-line truck driver and a single inquiry to a Jackson resident who knew Nadine (R. 216-218 and 229). The facts pertaining to Appellant's knowledge that the children had been with the McGuires in Jackson for many months during the summers of 1974 through 1978 while disputed, were not categorically denied or contradicted by him. Where evidence in an equity case consists

largely of testimony of witnesses, this Court should defer to, and rely upon, the trial judge's resolution of conflicts in that evidence. Greener, supra.

Respondents cite the recent case of Adoption of Guzman, 586 P.2d 418 (Utah 1978) as the best authority in support of the trial court's ruling. Guzman was an abandonment action against a natural mother. The evidence was that the mother had failed to communicate with the children, neither had she sent letters or gifts or made calls to them, over a four-year period even though the children, their father and step-mother all resided in the same county as the mother and their address and telephone number were listed in the telephone directory. This Court stated:

> During an interval of approximately four years, appellant Anita appears to have shown little interest in the children here involved and her failure to exercise her rights of visitation and in failing to communicate or to attempt to communicate with the children or with her former husband and father of the children and his present wife appear sufficient to support the court's conclusion that she intended to abandon them. (Emphasis added)
>
> 586 P.2d at 419

While Guzman may be distinguished for the reason that those parties and the children all resided in the same county and state, the case is analogous for the reason that a telephone number and address were available to the non-custodial parent at which inquiry could be made regarding the children. Clearly, the principle urged by Respondents here is recognized in Guzman: a non-custodial parent's failure without good cause to communicate,

or attempt to communicate, with his children or show other interest in them for the period established in this case, six and one-half years (April 1973 to October 1979), justifies a finding of intent to abandon.

Appellant McKinstray knew that his children had been in Jackson on numerous occasions over the years 1974 through 1978. He also knew that the McGuires continued to reside at the same address during that period with the same telephone number he had called many times prior to 1974 to arrange visitation. Notwithstanding, he never requested his mother or any other family member to assist in obtaining information regarding the children's whereabouts, and he consciously failed to avail himself of the most obvious and ready source of that information in Jackson: the McGuires.

Appellant's apologies for not pursuing the information that would have enabled him to locate his children are legally indefensible and morally timorous, viz: upon advice of counsel in 1973 or 1974 he decided to "let Nadine calm down a little more" (R. 219); although he was on speaking terms with Mrs. McGuire, he did not inquire of her regarding his children's address because he assumed ". . . she wouldn't tell me where they were" (R. 221); if he didn't pay the court-ordered support he ". . . figured in time she would get fed up with it and she would--she would start something again" (R. 231); and, "as time went by I felt that it was better to wait until--and let them [Melody and Peter] contact me" (R. 224). He also refused the available remedy afforded by

the Wyoming divorce court as he was "fed up" with lawyers and "disgusted with the court system" (R. 227). Clearly, Appellant's failure to communicate with his children was the consequence of his decision not to do so. He made no good faith attempt to locate them for no justifiable reason.

The most telling revelation of Appellant's intent, however, was that given by his own wife who testified that in 1973 or 1974 during a conversation with her about what he felt ". . . for not having his kids" he said that ". . . he didn't want any more kids. He didn't want to go through this pain anymore. He just didn't want no part of it" (R. 171). Appellant's decision to abandon Melody and Peter was expressed and unequivocal, and over the six-year period between 1973 and 1979 his conduct manifested that intent.

Appellant's argument that the best interests of the children is a proper criterion of proof in an abandonment case misses the mark. The law of the case is stated in Adoption of Maestas, 531 P.2d 492, 494 (Utah 1975) to be that ". . . the question of the welfare of the child is not material in a judicial determination of abandonment." In both the Robertson[1] and Hall[2] cases cited by Appellant, the trial court had found no abandonment and each case was affirmed on appeal. The statements in those decisions regarding the "welfare of the children" and "anxieties on both sides" were obiter.

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[1] Robertson v. Hutchinson, 560 P.2d 1110 (Utah 1977).

[2] Hall v. Anderson, 562 P.2d 1250 (Utah 1977).

The trial court's findings that Appellant failed to maintain a parental relationship with his children as a consequence of his having made only token effort to do so, without good cause or justification, and that he intended to abandon them are amply supported by the evidence in the record before this Court.

CONCLUSION

This appeal presents the hackneyed case of a discontented Defendant in an abandonment action who, troubled at being called to account for his indifference to the welfare and love of his children, hopes another try will redeem him. The trial court in the exercise of its broad discretionary powers denied Appellant's motion for that second try. No abuse of discretion in that decision has been shown.

The judgment of the lower court is convincingly confirmed by the record. The statements therein of Appellant and his own witnesses are the clearest testament to the reality of his desertion of Melody and Peter. Appellant is not, therefore, entitled to any relief on this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 1980, I personally delivered two (2) true and correct copies of the foregoing Brief of Respondents to MELVIN G. LAREW, JR., Attorney for Appellant, 345 South State Street, Suite 200, Salt Lake City, Utah 84111.

GARY L. PAXTON